SUPREME COURT, U. S.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-717

ALEXANDER J. ANTOINE and
IRENE F. ANTOINE, his wife — *Appellants,*

v.

THE STATE OF WASHINGTON, — *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

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September, 1974

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STATUTES INVOLVED

Appellee State of Washington (hereinafter referred to as "State") cannot accept appellants' (hereinafter referred to as "Antoine") statement of "Statutes and Federal Laws Involved."[1]

The paramount statutes and federal laws involved in this appeal are:

1. Executive Order Establishing Original Colville Reservation Boundaries, July 2, 1872, 1 Kappler 916.[2]

[1] App. Br., p. 4.
[2] Single App., p. 3.

2. Congressional Prohibition of Execution and Ratification of Indian Treaties, March 3, 1871 (23 Stat. 79, 25 U.S.C. 71).
3. State of Washington Enabling Act, approved February 22, 1889 (25 Stat. 180) and the President's Proclamation Declaring Statehood, November 11, 1889 (26 Stat. 10).
4. Agreement between Colville Tribe and United States, May 9, 1891.[3]
5. Restoration of Northern Half of Colville Reservation to the Public Domain, July 1, 1892, 27 Stat. 62.
6. Congressional Authorization of $1,500,000.00 to Colville Tribe for Lands Acquired by Purchase of "Northern Half," July 21, 1906 (34 Stat. 325).[4]
7. Revised Code of Washington 77.16.020 and 77.16.030.[5]

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The State does not accept Antoine's statement of questions presented. The State submits that the question presented is:

> Is the 1891 "Agreement of Sale" between the Colville Indian Tribe and the United States a treaty thus precluding the state of jurisdiction to enforce its hunting laws on Colville Indians on the lands sold which were formerly the Northern Half of the Colville Reservation?

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[3]Single App., pp. 4-11, Def. Ex. #4.
[4]Juris. Statement, App. G -12.
[5]Juris. Statement, App. G 2-4.

STATEMENT OF THE CASE

The State cannot accept Antoine's statement of the case. The trial court considered this case on facts stipulated by counsel; no testimony was submitted. The facts, as stipulated, are:

> (1) That on September 11, 1971, the defendant was engaged in the activity of hunting for deer in Ferry County, Washington, within the exterior boundaries of the original Colville Indian Reservation as established by Executive Order of 1872.
> (2) That at the time and on the date in question the defendant had in his possession a game animal; to-wit, a deer.
> (3) That on the date in question the hunting season was closed for deer in the area involved in Ferry County.
> (4) The defendant was a duly enrolled and qualified member of the Colville Tribe of Indians.
> (5) That the offenses occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists.
> (6) That the land upon which the offense occurred was unallotted non-Indian land at the time of the offense.[6]

In addition to the stipulated facts, Antoine submitted four exhibits consisting of certified re-typed copies of the 1891 agreement between the Colville Tribe of Indians and the United States and notes of the negotiations.[7] The State introduced one exhibit[8]

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[5]R. 6-9; Antoine states as a "fact" that he "shot one deer for personal use" (App. Br., p. 25) that "500 or more Colville families who live on or near the reservation * * * depend upon game as a food source" (App. Br., p. 10); and that the Colvilles' "hunting was a major source of food and a major activity." (App. Br., p. 11 and fn. 33 and 34). No such "facts" are in the record before the Court.

[7]Def. Ex. #1 through 4.

[8]State's Ex. #1.

which is a map with a red circle indicating the location of the illegal deer shining activities on unallotted lands outside the present boundaries of the Colville Reservation in what is referred to in this brief as the "Northern Half." The Northern Half consists of the lands sold under the 1891 agreement of sale which were formerly the Northern Half of the Colville Reservation.

SUMMARY OF ARGUMENT

1. The 1891 Agreement of Sale between the Colville Indian Tribe and the United States is not a treaty.

Congress had, previous to 1891, prohibited the making of further treaties with Indian tribes. 25 U.S.C. 71, 23 Stat. 79. *Starr v. Long Jim*, 227, U.S. 613 (1913) held that an agreement with the Columbia and Colville Indians, similar to the 1891 agreement of sale, could not be a treaty because it was executed after March 3, 1871.

The agreement of 1891 could not be construed as a treaty because it was not ratified in accordance with the *United States Constitution*, Article II, Section 2, Clause 2.

The treaty making power conferred by the *United States Constitution* cannot be used to achieve an unconstitutional end. Once a state has lawfully assumed jurisdiction, it cannot be taken away with-

out its consent. *Geofroy v. Riggs*, 133 U.S. 258 (1890).

2. The State of Washington possesses jurisdiction to enforce its hunting laws on the Northern Half of the original Colville Indian Reservation.

Congress expressly extinguished the Northern Half of the Colville Indian Reservation, 27 Stat. 62 (1892). Congress has subsequently treated it as extinguished. 34 Stat. 80; 39 Stat. 123; 39 Stat. 672; 39 Stat. 1778. This Court has recognized the extinguishment of the Northern Half. *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1972).

Antoine stipulated in the trial court that the offense occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists. (R. 8)

There has been no subsequent withdrawal of the lands in the former Northern Half of the Colville Indian Reservation from the jurisdiction of the State of Washington. The consent of the state legislature is constitutionally required. *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937).

Public Law 280, 67 Stat. 588, does not purport to limit the exercise of jurisdiction by the State of Washington over the lands in question because it applies only to Indian reservations in existence at the date of its enactment (August 15, 1953). The Northern Half of the Colville Indian Reservation was extinguished in 1892. 27 Stat. 62.

ARGUMENT

1. Introduction

There is no dispute that appellants[9] violated Washington State game laws in an area once a part of the Colville Indian Reservation. The location where the crime occurred is not part of that reservation because the reservation status of that area was terminated pursuant to an act of Congress.[10] The question is simply the validity of the claim of Alexander Antoine to an immunity from prosecution for such off-reservation violations. It is the State's position that there is no impediment to the enforcement of the state game laws in this case.

2. The 1891 Agreement of Sale between the Colville Indian Tribe and the United States is not a Treaty.

It is the State's position that the 1891 "agreement of Sale"[11] is not a treaty and therefore the Supremacy Clause of the Constitution[12] does not create an impediment to the enforcement of the state game laws in this case.

Congress specifically prohibited further recognition of Indian tribes as independent nations subsequent to March 3, 1871. The prohibition against

[9]It is admitted that Irene Antoine is not a member of the Confederated Tribes and Bands of the Colville Indian Reservation. App. Br., p. 4, fn. 14. The United States notes that she "is a Canadian Indian and not enrolled in the United States." (Memo. for United States as *Amicus Curiae*, p. 2.) No argument is advanced that she is entitled to an immunity from the application of the hunting laws in qu stion under any of the theories advanced by appellants.

[10]27 Stat. 72 (1892).

[11]Single App., pp. 4-11, Def. Ex. #4.

[12]*United States Constitution*, Art. VI, Cl. 2.

further treaty-making is found in 25 U.S.C. 71, 23 Stat. 79:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 31, 1871, shall be hereby invalidated or impaired."

Starr v. Long Jim, 227 U.S. 613 (1913), held that an agreement between the United States and representatives of the Columbia and Colville Indians was not a treaty because of 25 U.S.C. 71, *supra*. Congress chose to conduct its relationship with Indian tribes by statutes or agreements rather than by the treaty making power subsequent to March 3, 1871.

Antoine[13] and the Federal Government [14] have chosen to ignore the clear language of 25 U.S.C. 71, *supra*. The argument is advanced that Congress "ratified" the 1891 agreement of sale by a 1906 authorization act.[15] The short answer is that the *Constitution of the United States* specifically provides for the making of treaties by the Federal Government by stating that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." *Constitution of the United States*, Article II, Section 2, Clause 2. No authority is provided to

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[13] App. Br., pp. 14-18.

[14] U. S. Memo. as *Amicus Curiae*, pp. 4-6.

[15] 34 Stat. 325, 377-378; 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1074.

support Antoine's novel assertion that House of Representatives' authorization and appropriation acts amount to ratification. The authority cited by the Federal Government, as *Amicus Curiae*, does not deal with question of treaty ratification.[18]

An additional reason militates against the argument that the 1891 "agreement of sale" is a treaty. Congress exercised its "absolute control" over the Northern Half of the Colville Indian Reservation by ceding its jurisdiction to the State of Washington on July 1, 1892, 27 Stat. 62-64. This statute provides that the Northern Half:

> * * * be, and is hereby, vacated and restored to the public domain, notwithstanding any Executive Order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington." (27 Stat. at 62)

It is well established that the State of Washington acquired jurisdiction over the Northern Half by virtue of the cession. *United States v. Pelican*, 232 U.S. 442 (1914); *Seymour v. Superintendent*, 368 U.S. 351 (1962); and *Mattz v. Arnett*, 412 U.S. 481 (1974) at footnote 22.

To construe the 1906 authorization act and sub-

[18] e.g., *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 293; *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116. Both opinions deal with subsequent Congressional ratification of executive acts under the President's war power and of administrative interpretation and approval of certain water development and use contracts of the Secretary of Interior.

sequent appropriation acts as constituting a "ratification" of the 1891 "agreement of sale" would elevate its status to that of a treaty. Such a construction would violate the treaty-making power granted by the *Constitution of the United States*, Article II, Section 2, Clause 2. The treaty-making power does not extend so far as to authorize a cession of any portion of a state's territory without its consent. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Fort Leavenworth Ry. Co. v. Lowe*, 114 U.S. 525, 532-533 (1885). The Act of July 1, 1892, 27 Stat. 62, vacated and restored to the public domain a certain portion of the reservation (the Northern Half) to be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The state legislature has not expressed its consent to a retrocession of the Northern Half to the Colville Indian Tribe or the United States. The Northern Half remains under state jurisdiction.

Antoine and the Federal Government, proceeding from the faulty premise that a treaty right is involved, rely upon a number of decisions involving interpretations of federal treaties pertaining to fishing and hunting, e.g., *Tulee v. Washington*, 315 U.S. 681 (1942); *United States v. Winans*, 198 U.S. 371 (1905); *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968); *Dept. of Game v. Puyallup Tribe* (1973), 414 U.S. 44. The State submits that such reliance is not apropos since no "treaty" is involved in this appeal.

3. The State of Washington possesses jurisdiction to enforce its hunting laws on the Northern Half of the original Colville Indian Reservation.

The State of Washington was admitted into the Union in 1889 pursuant to its Enabling Act. (25 Stat. 180) It entered the Union on equal footing with all other states including jurisdiction over all lands included except areas over which jurisdiction was specifically reserved.

The provision reserving lands from the jurisdiction of Washington is specific:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and *said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.* * * *[11] (25 Stat. 180)

Lands of the Colville Reservation established prior to statehood by Executive Order were thus retained under the "jurisdiction and control of the congress of the United States."

In 1892 Congress transferred its reserved jurisdiction to the State of Washington. 27 Stat. 62 provides, in relevant part, that the Northern Half:

> be, and is hereby, vacated and restored to the

[11] Washington State Constitution, Article XXVI (Compact with the United States) includes nearly an identical provision.

> public domain, not withstanding any Executive Order or other proceeding whereby the same was set apart as a reservation and for any Indians or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington.

This resulted in removing the Northern Half of the original reservation from its reservation status and granted the State of Washington jurisdiction over those lands to the same extent the state had received jurisdiction over other public lands by the Enabling Act.

The House proposal (23 Cong. Rec. 3840) and the agreement of 1891, the status of which has previously been discussed, had included a reservation of some hunting and fishing rights. However, that Act, as passed by Congress (as noted in the United State's Memorandum at page 5), did not include any reservation of hunting and fishing rights. The absence of any reservation of hunting or fishing rights in the final act reflects Congressional intent not to reserve such rights.[15]

Congress subsequently has, on numerous occasions, dealt with the Colville Indian Reservation and treated it as diminished; as if the former Northern Half were no longer on Indian reservation nor Indian country.

In 1906 Congress granted the Secretary of In-

[15]See: *Mattz v. Arnett*, 412 U.S. 481 (1972).

terior authority to sell or dispose of certain unallotted lands in the diminished Colville Indian Reservation. 34 Stat. 80, 81, 82. Congress referred to the diminished Colville Indian Reservation in the State of Washington in the annual appropriation of 1916-17 for the Bureau of Indian Affairs. 39 Stat. 123 at 154. Again, Congress extended the authority of the Secretary of Interior to dispose of surplus unallotted lands of the diminished Colville Indian Reservation. 39 Stat. 672.

President Woodrow Wilson issued a proclamation pursuant to Congressional authority opening the unallotted irrigable lands within the diminished Colville Indian Reservation to homesteading entry on May 3, 1916. 39 Stat. 1778, IV Kappler, *Indian Affairs, Laws, and Treaties*, 966. Congress referred to the diminished Colville Indian Reservation in the State of Washington in a statute providing for the descent and distribution of lands to heirs of deceased Indians and the disposition and sale of unallotted land of deceased Indians. III Kappler, *Indian Affairs, Laws, and Treaties*, 476.

The status of portions of the Colville Reservation has been the subject of litigation. This Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962) specifically recognized the severance of the Colville Reservation by the 1892 Act, *supra*. The Northern Half, which is the subject matter of this litigation was subject to state jurisdiction. The issue presented in *Seymour* was whether the Southern Half had been,

diminished. The Court was confronted with a question of jurisdiction of the State of Washington for a criminal offense committed by a Colville Indian on the diminished (Southern Half) of the Colville Reservation in the town of Omak, Washington. The Court overruled the Supreme Court of the State of Washington which had previously held that the state possessed jurisdiction over the Southern Half. 368 U.S. at 357. In reaching this conclusion, the Court was careful to distinguish between the Southern Half, i.e., diminished reservation boundaries and the jurisdictional status on the former Northern Half. The Court stated:

> The case turns upon the current status of the Colville Indian Reservation—a reservation created in 1872 by Executive Order of President Grant which declared that "the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for the Colville Indians. *In 1892, the size of this reservation and allotments made to individual Colville Indians, about one-half of the original Colville reservation, since commonly referred to as the "North Half," should be vacated and restored to the public domain* * * *" This Act did not, however, propose to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the government for their (the Colville Indians') use and occupancy. Since the burglary of which petitioner was convicted occurred on land within the South Half, it is clear

> that state jurisdiction over the offense charged, if it is to be found at all, must be based upon some federal action subsequent to the 1892 Act. (368 U.S. at 354. Emphasis supplied.)

The Court, in considering termination of Indian reservations and how it might be accomplished by Congress, held that the 1892 Act is an example of clear Congressional intent to terminate a portion of the Colville Reservation. *Mattz v. Arnett*, 412 U.S. 481 (1972). The Court, speaking unanimously through Justice Blackmun, stated:

> Congress has used clear language of express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ("The Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) (adopted just two weeks after the 1892 Act with which this case is concerned, providing that the North Half of the Colville Indian Reservation, "the same being a portion of the Colville Indian Reservation * * * be, and is hereby, vacated and restored to the public domain"), and *Seymour v. Superintendent*, 368 U.S., at 354; 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished"). (412 U.S. at 504, fn. 22)

Further, it was stipulated at trial of this action that "the offenses occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists." and was "unallotted."[19] Thus, the *locus delicti* was not within an area "excepted from the portion restored to the public domain." *United States v. Pelican*, 232 U.S. 442 at 449 (1914).

[19] R. 8.

There has been no subsequent withdrawal of the lands in the former Northern Half of the Colville Reservation from the jurisdiction of the State of Washington. Once a state has jurisdiction over its lands, the Constitution specifies that such jurisdiction may be retroceded only with consent of the legislature of that state. *United States Constitution*, Article I, Section 8, Clause 16. This provision applies broadly; not just to retrocession of jurisdiction for specified uses (e.g., *James v. Dravis Construction Co.*, 302 U.S. 134 (1937); *State ex rel. Board of Commissioners v. Bruce*, 106 Mont. 322, 77 P.2d 403, aff'd 305 U.S. 577 (1938)).

Where there has been no expression of consent by the legislature as constitutionally required, the state retains jurisdiction despite the fact that the federal government has repurchased lands once under its exclusive jurisdiction, *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937); *United States v. McGowan*, 302 U.S. 535 (1938).

The State assumed criminal and civil jurisdiction over established Indian reservations in response to Public Law 280 (67 Stat. 588).[20] As previously noted, the Northern Half of the Colville Indian Reservation was extinguished by Congress and the State assumed jurisdiction over it in 1892. The Northern Half is not within the purview of Public Law 280,

[20]RCW 37.12.010 provides, in relevant part:

"The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, *reservations*, country and lands within this state in accordance with the consent of the United States given by the Act of August 15, 1953 (Public Law 280, 83rd Congress, 1st session). * * *"

or the State's legislative response thereto, because it was not an established Indian reservation on August 15, 1953—the effective date of the Act.

Menominee Tribe v. United States, 391 U.S. 404 (1968) holds that Public Law 280 must be construed *in pari materia* with the Menominee Termination Act. The Court noted:

> Public Law 280, as amended, became the law in 1954, nearly seven years *before* the Termination Act became fully effective in 1961. In 1954, when Public Law 280 became effective, the Menominee Reservation was still "Indian country" within the meaning of Public Law 280. (391 U.S. at 411, Emphasis by the Court)

Antoine's reliance upon *Menominee* is misplaced because the extinguishment of the Northern Half of the Colville Indian Reservation by Congress some 62 years prior to its enactment of Public Law 280.

The arguable limitation on the exercise of state jurisdiction over "any right, privilege or immunity afforded under federal treaty, agreement, statute or Executive Order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof"[21] is not applicable because the Northern Half lost its unique status as an established Indian reservation in 1892 (27 Stat. 62). Public Law 280, *supra*, by its terms, does not apply to state jurisdiction over Indians outside reservation boundaries.

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[21] RCW 37.12.060; App. Br., p. 16, fn. 43 and United States Memo. as *amicus curiae*, p. 4, fn. 3.

CONCLUSION

The facts of this case are not in dispute. The novel proposition advanced by Antoine is that the Colvilles may reclaim rights in the extinguished Northern Half of the original reservation. Alternatively, he argues that he may claim "treaty rights" by virtue of an 1891 agreement of sale.[22] This Court should reject such claims.

For these reasons, the State submits that the decision of the lower court should be affirmed and that both appellants' convictions for hunting and possessing a game animal during closed season contrary to state law be upheld.

Respectfully submitted:

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[22]Neither argument would support immunity from the challenged state laws for Irene Antoine.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-717

ALEXANDER J. ANTOINE AND IRENE F. ANTOINE, APPELLANTS

v.

THE STATE OF WASHINGTON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether an agreement between the Colville Confederated Tribes and the United States by which the Tribes ceded a portion of their lands, reserving hunting and fishing rights therein, was ratified by Congress and is binding on the State of Washington.

2. Whether a provision of the Agreement stipulating that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians

shall not be taken away or in anywise abridged", exempts the members of the Tribes from state game regulations, unless the State affirmatively shows a need to restrict their hunting in the interest of conservation.

STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of February 19, 1974, inviting the Solicitor General to express the views of the United States in the case, the Court having noted probable jurisdiction on June 17, 1974.

Alexander Antoine and his wife, Irene, were convicted in the courts of the State of Washington for shooting and killing a deer during the closed hunting season fixed by state law. Their defense was that they killed the deer on land within the boundaries of the original Colville Indian Reservation on which they have the right to hunt subject only to tribal or federal regulation.[1] Mr. Antoine is an enrolled member of the Colville Confederated Tribes, which are recognized by the United States Government. Mrs. Antoine is a Canadian Indian and is not enrolled in the United States.[2]

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[1] The status of the southern half of this reservation was the subject of *Seymour* v. *Superintendent*, 368 U.S. 351. This case, as explained within, concerns residual rights in the northern half.

[2] Before the State courts, the State apparently did not contest that both Mr. and Mrs. Antoine are entitled to the rights of members of the Colville Tribes on the property in question, if such rights encompass hunting free of state regulation. See

By Executive Order of July 2, 1872 (1 Kapp. 915), President Grant established a reservation for Indian tribes which subsequently formed the Colville Confederated Tribes. Pursuant to an Act of August 19, 1890 (26 Stat. 355), a commission was appointed by the President to negotiate with the Tribes for "the cession of such portion of said reservation as said Indians may be willing to dispose of * * *." The commission entered into an agreement with the Tribes dated May 9, 1891 (App. 4-11), in which the Tribes surrendered to the United States "* * * all their right, title, claim and interest in * * *" a tract of land constituting approximately the northern half of the reservation (App. 4, Art. 1). However, with respect to the ceded tract, Article 6 of the Agreement expressly provided that "* * * the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (App. 7). Article 12 stipulated that the Agreement "shall go into effect from and after its approval by Congress" (App. 10). Further articles, among other things, granted the Indians a right to allotments on the ceded lands, and promised them a cash payment of $1,500,000, in five installments.

In 1892, without expressly ratifying the Agreement, Congress passed a law (Act of July 1, 1892, 27 Stat. 62), providing that the northern half of

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App. 18, 20-21. In those circumstances, it may now be estopped from raising the issue of Mrs. Antoine's status. See Brief of Appellee, pp. 10 n. 9, 21 n. 22.

the reservation was "vacated and restored to the public domain * * *," and was "open[ed] to settlement * * * [to be] disposed of under the general laws applicable to the disposition of public lands in the State of Washington" (*id.* at 63). The Act omitted any reference to Article 6 of the 1891 agreement, securing the right to hunt and fish, or to Article 11, providing a consideration of $1,500,000 for the land sold.

The Colville Tribes, recognizing that the government was not carrying out the terms of the 1891 Agreement, began to press for further action by Congress. See *Butler and Vale* v. *United States*, 43 Ct. Cl. 497; see also S. Rep. No. 2561, 59th Cong., 1st Sess. By the Act of June 21, 1906, 34 Stat. 325, 337-378, Congress reconsidered its prior action and authorized the payment of $1,500,000 for the land ceded to the United States. The 1906 Act recited, *inter alia*, that payment of the money was "[t]o carry into effect the agreement [dated May 9, 1891] * * * entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *." The $1,500,000 authorized in the 1906 Act was actually appropriated for the Indians in five subsequent Acts, each providing $300,000: 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1075. Each of these statutes is essentially identical and provides that the appropriation is (34 Stat. 1015, 1050-1051):

> In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by [the 1892 Act] * * * being a part of the full sum set aside * * * in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, *ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one,* * * *. [Emphasis added.]

In affirming appellants' conviction, the Supreme Court of the State of Washington held that the 1891 Agreement was a mere contract between the Indians and the United States, which does not bind the State of Washington (App. 30). The court also held that the Agreement, even if enforceable against the State, was not intended to exempt the Indians from state game laws (App. 30-31). We challenge both conclusions.

ARGUMENT

I

THE AGREEMENT OF MAY 9, 1891, WAS RATIFIED BY CONGRESS AND IS BINDING ON THE STATE OF WASHINGTON

The Agreement of May 9, 1891, was never intended to be complete in itself: by its terms it was to become effective "* * * from and after its approval by Congress" (App. 10). The initial question, therefore, is whether that subsequent ratification occurred. If so, the Agreement would have the same force as

an Act of Congress and thus became a law binding on the States. U.S. Const., Art. VI, cl. 2.

1. Contrary to appellee's argument (Br. 10-13), it does not matter that the agreement was made after the Act of March 3, 1871 (16 Stat. 544, 566, 25 U.S.C. 71) ending the practice of making treaties with Indian tribes. Congress's plenary power to legislate on the subject of Indian affairs and Indian property remained unaffected. See *Morton* v. *Mancari*, No. 73-362, decided June 17, 1974, slip. op. 16-17. So far as relevant here, the only effect of the 1871 law was that, henceforth, for purchases of land from Indian tribes, the consent of the House, as well as the Senate and President, would be required—in short, that an Act of Congress would be necessary to ratify an agreement. But an agreement so ratified is the supreme law of the land, just as a treaty would be.

This was settled by the Court shortly after the practice of making treaties with the Tribes was ended. In *Choate* v. *Trapp*, 224 U.S. 665, it was held that tax exemptions granted by an agreement between the United States and an Indian tribe made in 1897 as part of a cession of Indian lands, and ratified by Act of Congress, were enforceable against the State of Oklahoma. The Court also announced the rule that the terms of the Agreement and ratifying Act by which the Tribe ceded its land, even though creating a tax exemption which would ordinarily be interpreted strictly, should be liberally read in favor of the Indians. *Id.* at 674-677; see also *Squire* v.

Capoeman, 351 U.S. 1. A few years later, in *Perrin* v. *United States*, 232 U.S. 478, the Court similarly upheld a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on the land ceded in the agreement. *Id.* at 480. These precedents are equally applicable to the reservation of hunting and fishing rights in an agreement relinquishing land.[3]

2. That Congress did ratify the 1891 Agreement is shown by the language of the Acts of Congress and their legislative history. The original intent was to purchase the northern half of the Colville Tribes' land under terms and conditions satisfactory to the Tribe. Indeed, it was Congress itself, by Act of August 19, 1890, *supra*, that authorized the President to appoint a commission to negotiate an agreement with the Tribes for the purchase of the land. Accordingly, an agreement was worked out and signed (App. 4-11). The next year, the House of Representatives voted to ratify the Agreement with certain changes.[4]

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[3] We note also that the State of Washington, in assuming limited jurisdiction over Indians under Pub. L. 83-280, 67 Stat. 588, enacted RCWA 37.12.060 which states:

> Nothing in this chapter * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, *agreement*, statute, or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing, or regulation thereof. [Emphasis supplied.]

[4] Specifically, the House bill replaced the $1,500,000 lump sum payment called for in the agreement, with a payment of

To be sure, the Senate disagreed,[5] and (as we have seen) the 1892 Act provided no consideration for the Indians, and made no mention of the hunting and fishing rights preserved in the agreement. But that is not the end of the story.

This failure by Congress to live up to the terms of its agreement was before long widely seen as unacceptable. In addition to the Tribes' protest (see p. 4, *supra*), Mark Fullerton, who had been head of the commission that negotiated the treaty and then had become Chief Justice of the Supreme Court of the State of Washington, spoke out. In a letter reprinted in the Senate Report on the future 1906 Act (S. Rep. No. 2561, *supra*, at p. 140) he said:

> It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie to earth, I can not help a feeling

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$1.25 per acre, to be paid to the credit of the Indians as the land would be opened for homesteading. The bill explicitly preserved the hunting and fishing rights guaranteed in the agreement. 23 Cong. Rec. 3840.

[5] The Senate contested the Indians' title to the Reservation on the ground that it had been created by Executive Order, and expressed unwillingness to pay for what was being taken. See S. Rep. No. 664, 52d Cong., 1st Sess., p. 2. The Senate bill eventually became the Act of July 1, 1892.

> of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation.

The Department of the Interior also publicly favored a bill to carry into effect the Agreement of 1891 and assured the Congress that it had:

> * * * reviewed at some length the matter of the title of the Colville Indians * * * and * * * had not the slightest doubt as to the possessory rights of said Indians to the lands within the reservation, "rights which the courts have always recognized without qualification * * *." S. Rep. 2561, *supra*, at pp. 137, 139.]

And, finally, there were growing pressures to open to non-Indian settlement the southern half of the original reservation, an action to which the Tribes would consent only if the 1891 Agreement were fully carried out. See S. Rep. No. 2561, *supra*, at pp. 134-140.

These combined motives finally persuaded Congress to respond. And so, by the Act of June 21, 1906, 34 Stat. 325, 377-378, Congress authorized payment of $1,500,000 expressly "[*t*]*o carry into effect the agreement* bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *" (emphasis added). Later in the same session, in appropriating $300,000 of the authorized funds. Congress expressly referred to the 1906 Authorization Act as an Act "ratifying the agreement ceding

said land to the United States, under date of May ninth, eighteen hundred and ninety-one" (*supra*, p. 5). These enactments, we submit, fully qualify as a congressional ratification of the 1891 Agreement.[6]

3. The State of Washington argues (Br. 18-20) that when the land in question was opened to settlement by the Act of July 1, 1892, State jurisdiction vested and could not be revoked by the 1906 ratification of the 1891 Agreement. This, however, misconstrues the effect of a cession to the United States and ignores the continuing power of Congress.

The land after cession remained public land of the United States, except to the extent that patents were issued to homesteaders. Most of the ceded tract remains federal land today and is part of the Okanogan Colville National Forest.[7] Thus, in addition to its

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[6] The Court has found congressional ratification of Presidential acts creating property rights on far less certain language. Compare *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116. In *Confederated Tribes of the Colville Reservation* v. *United States*, Docket No. 181-C, pending before the Indian Claims Commission, the United States, relying upon the language of the Act of June 21, 1906, but not the subsequent appropriations Acts, argued that the 1906 Act did not constitute a ratification of the 1891 Agreement. Considering the Acts together, we now conclude to the contrary (and have so informed the Commission, while preserving our right to rely in that case upon the possibility that this Court in the present case may disagree with us).

[7] See U.S. Department of the Interior, Bureau of Indian Affairs Map, *Indian Lands and Related Facilities as of 1971*. We are lodging copies of the map with the Clerk and supplying copies to opposing counsel.

power to legislate for the protection of Indians wherever located (*United States* v. *Ramsey*, 271 U.S. 467, 471; *Morton* v. *Ruiz*, 415 U.S. 199, 236), Congress retained plenary authority over the use of public land. *United States* v. *Gratiot*, 14 Pet. 526, 537.[8] That power was amply sufficient to vindicate rights promised to the Tribes in the 1891 Agreement.[9]

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[8] See, also, *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404-405; *McKelvey* v. *United States*, 260 U.S. 353, 359. Even without statutory permission, Federal officials may kill deer on federal land in violation of state game laws, when the killing is for the good of the property, *Hunt* v. *United States*, 278 U.S. 96, or for the purposes of an environmental study, *New Mexico State Game Commission* v. *Udall*, 410 F. 2d 1197 (C.A. 10), certiorari denied, 396 U.S. 961. Here, of course, the Indians' right is protected by statute.

[9] The only person who might legitimately complain of the 1906 ratification would be someone who bought land in the ceded area between 1892 and 1906 in reliance on the 1892 Act, or his successor, assuming the reserved hunting and fishing rights apply to private property. But see 12, *infra*. Even such a purchaser, however, could not set aside the 1906 Act of Congress; his remedy would be to seek just compensation for any diminution of the value of his property resulting from the 1906 ratification of hunting and fishing rights.

II

STATE HUNTING LAWS ARE INAPPLICABLE TO BENEFICIARIES OF THE AGREEMENT OF MAY 9, 1891, IN THE ABSENCE OF A SHOWING OF THEIR NECESSITY AS CONSERVATION MEASURES

Assuming that the 1891 Agreement was ratified by Congress and therefore has the same force as a federal statute or treaty, the question becomes: What rights were guaranteed to the Tribes, and do they include the exemption from the State closed season law claimed here?

We must begin with the words of the Agreement. Article 6 provides "that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (App. 7). That is strong language which, on its face, reserves an important privilege—especially so when we remember the historic dependence of these Tribes on hunting and fishing. To be sure, the right conceded is not made exclusive; it is to be enjoyed "in common with all other persons." But the guarantee is something more than a mere exemption from discrimination. The Indians are not only promised that they will legally share whatever hunting and fishing rights others may enjoy; they are guaranteed these rights absolutely, albeit without power to exclude others. The Agreement grants nothing to non-Indians; the State remains entirely free to prohibit hunting and fishing by all others; not so with respect to Indians, because they enjoy special rights immunized by federal law.

So much is well settled. Indeed, the principle was established on comparable language as long ago as *United States* v. *Winans*, 198 U.S. 371, and was reaffirmed as recently as *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392.[10] As the Court said in the latter case (391 U.S. at 397), quoting in part from the earlier decision (198 U.S. at 380):

> To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" * * * would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

And, again: "The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State * * *." 391 U.S. at 398. Those decisions govern here. Indeed, this is a stronger case in light of the additional provision that the right "shall not be taken away *or in anywise abridged.*" Emphasis added. Compare n. 10, below.

Does it follow then, that the Tribes are wholly exempt from *all* State regulation? Strict logic might

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[10] *Winans* involved Article III of the Treaty of 1859 with the Yakamas (12 Stat. 951, 953) which, in pertinent part, reserved to the Indians in the area ceded to the United States "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."

Puyallup involved Article III of the 1854 Treaty of Medicine Creek (10 Stat. 1132, 1133) which, in pertinent part, provided, with respect to the ceded lands:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * *.

lead us to that extreme. See *Ward* v. *Race Horse*, 163 U.S. 504, 514. But the Court has never gone so far. Although recognizing a unique easement in favor of the Indians over private lands to exercise their fishing rights (*Winans, supra; Seufert Bros. Co.* v. *United States*, 249 U.S. 194), a special immunity from State taxation (*Tulee* v. *Washington*, 315 U.S. 681), and an exemption from the prohibition of net fishing (*Puyallup I, supra; Washington Game Dept.* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44), some power of "regulation" has always been conceded to the States. Indeed, we believe the Court has sometimes been over-generous in recognizing State power.

What is clear is that, if federally protected Indians hunting and fishing rights are to have any meaning, the rule cannot be that "the State may do unto Indians as it may do unto all others." For, in that event, the Indian agreements and treaties would accord them no more than "equal protection"—a superflous gift—[11] and the rights expressly secured could be "taken away" or "abridged" with impunity, the

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[11] We recognize that some passages in both *Puyallup* opinions can be read as defining the fishing rights at issue there in terms of a promise of "equal protection" or an immunity from "discrimination." See 391 U.S. at 398, 403; 414 U.S. at 48. Those expressions, however, cannot be supposed to indicate the Court's view that the express reservation of hunting and fishing rights in Indian cessions merely protected the Tribes from discriminatory State legislation. Else, the Court would not have endorsed the holding of *Winans* that those provisions cannot be construed as confirming "no rights but such as they would have without the treaty." 391 U.S. at 397. See *supra*, p. 13. See, also Puyallup II, *supra*.

State having plenary power absolutely to prohibit hunting and fishing by its non-Indian citizens—whether in the interest of conservation or not. See *Geer* v. *Connecticut*, 161 U.S. 519; *Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549. Nor may the State effectively abrogate the Indian rights by terming its action mere "regulation." At the very least, quantitive restrictions on the exercise of those reserved rights must be "in the interest of conservation" and must meet "appropriate standards," which insure that the interference is "reasonable and necessary." *Puyallup I*, *supra*, 391 U.S. at 398.

The precise contours of that formula have not been defined by this Court. We suggest that it must be a strict standard. After all, what was envisoned when the 1891 Agreement was made was that most members of the Tribes would retire to the southern portion of their reservation, but retain the unencumbered right to use the ceded portion as a "hunting ground," with the sole condition that they could no longer exclude others. Inevitably, that right is already much diminished by the influx of non-Indian settlers, and the resulting contraction of hunting areas[12] and the

[12] We take it for granted that State law may validly confine off-reservation hunting, for Indians and others alike, to areas where the activity will not endanger residents. In this case, moreover, appellants apparently claim no right to hunt on fenced private property. See App. 26. Indeed, since Article 6 of the 1891 Agreement expressly excludes "lands * * * allotted to * * * Indians" from the exercise of hunting and fishing rights, it might well be argued that lands patented to non-Indians should enjoy the same exemption. One can distinguish between the easement over private land which

decrease in available game.[13] It would be unjust to permit further unnecessary dilution of what little remains of the old hunting rights of the Tribes.

In our view, the proper test is satisfied only when it is shown that the restriction—whether a total prohibition of hunting with respect to a particular species or a discrete "game reserve," the establishing of a "closed season," or the fixing of a numerical "bag limit"—*must be applied to Indians* in the interest of conservation. It is not enough that the regulation is labelled a "conservation measure." The State cannot abridge the Indians' federally protected rights without demonstrating a compelling need. No such showing has been attempted here. The State of Washington has not established that applying the ban on out-of-season hunting of deer on the land in question to the Colville Tribes is in any way necessary or even useful for the conservation of deer.[14] And it has not attempted to show whether, if some regulation is desirable, the taking of deer by Indians for private consumption need be prohibited, nor whether the Tribes' own conservation regulations are not ade-

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subsists under *Winans, supra,* to reach and exploit "usual and accustomed" fishing places, and hunting within fenced property. Thus, the treaty construed in *Winans* reserved the right to *hunt* only "upon open and unclaimed land" within the ceded area. See 198 U.S. at 378.

[13] We also assume that necessary safety regulations can be imposed on Indian hunting. Of course, no such regulation is at issue here.

[14] Thinning a herd [redacted] may be useful to conservation. See *Hunt* v. *United States, supra.*

quate. We therefore agree with appellants that their criminal conviction was invalid.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted.

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